

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

KENNETH WOMBLE,

Plaintiff

v.

Criminal No.: 3:13CV097

CAWTHORN, DESKEVICH & GAVIN, P.C.

and

WHARTON AUTO, LLC,

Defendants.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COMPLAINT

Comes now the defendant, Cawthorn, Deskevich & Gavin, P.C. (hereinafter "CDG"), by counsel, pursuant to Rule 12(b)(6) and moves to dismiss the Complaint, based on the following:

BACKGROUND

Your plaintiff, Kenneth Womble, (hereinafter "Womble") purchased a 2005 Dodge on December 5, 2005, utilizing financing. The installment note was at some point assigned to Citi Financial Auto(Citi), which provided for an original loan to Womble in the amount of \$24,205.42, with interest at 14.15%. The note required monthly payments of \$503.63 beginning February 12, 2006 and continuing for 71 months, or through January 12, 2012. See Complaint, Exhibit A.

Womble failed to make payments. On or around September 27, 2007, Citi Financial repossessed the vehicle. See Complaint, Exhibit C. The vehicle was auctioned on November 7, 2007. See Complaint, Exhibit D. The sales price obtained at the auction of Womble's vehicle resulted in a deficiency on the original note obligation. Mr. Womble's account was sold as part of a group of accounts to another entity and then to Wharton Auto, LLC (hereinafter "Wharton"). Wharton retained the services of CDG to pursue collection of the delinquent account.

CDG mailed an initial collection letter to Womble on April 25, 2012. Mr. Womble did not dispute, or request validation of the debt, and otherwise had no contact with CDG's office. No call attempts were made by CDG to Womble. On May 31, a second letter was mailed to Womble. No response from Womble was received. Accordingly, CDG filed a Warrant in Debt in the General District Court of Wythe County for the amount of the deficiency owed to Wharton. The

case was filed by CDG on or before October 26, 2012. The original Wythe General District return date was November 26, 2012. Womble appeared pro se and requested that the matter be set for trial. Trial was set for February 25, 2013. Pleadings were ordered and CDG filed, on behalf of Wharton, a Bill of Particulars on December 17, 2012. Womble, through his attorney, filed a Grounds of Defense and Plea in Bar on or around January 31, 2013. Before January 31, 2013, Womble had not indicated that Womble had retained counsel. CDG non-suited the General District Court case on February 6, 2013.

LAW AND ARGUMENT

As a preliminary matter, evaluating a Motion to Dismiss under Rule 12(b)(6), the court must accept as true all well pleaded facts, but not bald conclusions. Chisholm v. Transouth Financial Corp., 95 F.3d 331, 334 (4th Cir. 1996).

A. Complaint Paragraph 18(a)

The Complaint first seeks damages under 15 U.S.C. 1692(f)(1) of the Fair Debt Collection Practices Act against CDG and Wharton. Specifically, Womble contends that Womble signed an Installment Sales Contract with required monthly payments, beginning February 12, 2006. See Complaint, para. 7. Womble admits that Womble breached the terms of the installment contract on or after March 31, 2007. See Complaint, para.8. Womble argues, however, that any enforcement action by the Noteholder must have been filed by late 2011. Accordingly, Womble argues that CDG pursued a time barred debt one year beyond the applicable limitations period. Womble presumably argues that the filing was unfair and deceptive affording him relief under the FDCPA.

To resolve this issue, the court must first determine the correct statute of limitations applicable to this particular contract. The answer to this issue is that the answer is unclear. For that reason alone, Womble's claim of a deceptive fair debt violation should not survive a Motion to Dismiss.

Specifically, the Complaint alleges that the statute of limitations applicable to Womble's particular breach was the four year statute of limitations set forth in Virginia Code Section 8.2-

724. See Complaint, paragraphs 12 and 13¹. This statute of limitation applies to installment contracts of “goods” as defined by the Virginia Uniform Commercial Code. See, Virginia Code Section 8.2-105. Accordingly, in order to apply the four year statute of limitations, Womble would have to establish that the sale of the motor vehicle to him in 2005, and the coinciding note obligation, was the sale of a “good” under the uniform commercial code. Contrary to Womble’s legal conclusions, there is no binding Virginia precedent, or statute, clearly establishing that the sale of a motor vehicle in Virginia is, in fact, the sale of a “good” as defined by Virginia Code Section 8.02-105. There is one Circuit Court case from the Circuit Court of Fairfax County which, admittedly, concludes that the sale of a motor vehicle was and is the sale of a good. See Credit Acceptance Corp. v. Coates, 75 Va. Cir. 267 (2008). In that opinion, the trial court notes, however, that Virginia courts have never explicitly held that a motor vehicles falls within the UCC’s definition of a good. See Credit Acceptance Corporation. Additionally, whether motor vehicles are, or are not, considered the sale of a good, the Circuit Court of Fairfax County would not create any binding precedent that would bind the General District Court of Wythe County, Virginia. See Burkholder v. McGraw, 663 Va. Cir. 537 (2003). Moreover, even if this court were to conclude that the sale of a motor vehicle is in fact a sale of good, such decision after the fact would not necessarily impute this court’s legal conclusion to CDG at the time of the filing of the Warrant in Debt in the Wythe General District Court on October 26, 2012.

It is just as easy to conclude, on the other hand, that the applicable statute of limitations in the case is the five year statute of limitations applicable to written contracts under Virginia Code Section 8.01-246, or the statute for negotiable instruments. If Virginia Code Section 8.01-246 is applicable, the statute of limitations period would run five year from the date of the breach. As applicable to this fact pattern, the court is then required to dig yet another level to determine the breach date. Particularly, the contract at issue in this case, and as alleged by Womble, is an installment contract. See Complaint, Exhibit A. As such, the contract is a divisible contract which

¹While Womble’s Complaint alleges limitations governed by 8.2-724, it appears that Womble intended to rely on Virginia Code Section 8.2-725, which, if at all, would be applicable versus 8.2-724.

allows separate and distinct remedies for each payment as each installment becomes due. A contract to pay money in installments is divisible in its nature. Jones v. Morris Plan Bank of Portsmouth, 168 Va 284 (1937). Hence, each default in the payment of an installment may be the subject of an independent action. Id. The rights of action generally do not arise upon future periodic obligations until they are due, even though there has been a default in the performance of one of the earlier periodic obligations. Wiglesworth v. H.F. Taylor, III, Trustee, 239 Va 603 (1990). The fact that Womble may have initially breached his contract in March or April of 2007, does not end the analysis of breach. Womble, by law, continued to incur regular monthly breaches, each month that he failed to pay, creating coinciding monthly remedies. The contract did not require automatic acceleration of the debt. Acceleration of the debt was at the option of the Noteholder. See Complaint, Exhibit A, paragraph 12. A copy of paragraph 12 is attached hereto as Exhibit A

In other words, Citi could have continued to sue Womble for individual payments, or mitigate its damage by selling the asset through repossession, and liquidating its damage to a deficiency balance. Citi chose to liquidate the damage. Accordingly, the deficiency balance could not have been "due" under Wiglesworth until after the auction on November 7, 2007. That amount would be the amount owed by Womble effectively converting Womble's future payments through January 2012 to one payment. In this case, the Warrant in Debt was filed on October 26, 2012, prior to expiration of 5 years from the damage liquidation date. Accordingly, CDG contends that it actually filed the lawsuit within the applicable five year statute of limitations. If so, as a matter of law, any claim by Womble under 1692 (f)(1) should be dismissed.

Lastly, even if the four year statute of limitations under 8.2-725 is applicable, the defense of statute of limitations in Virginia is not a bar to filing, but an affirmative defense which, by statute, must be raised by a defendant in order to invoke its remedy. See Virginia Code Section 8.01-235. In this case, the pleading itself is allowed, subject to an affirmative defense. If the Virginia General Assembly has clearly stated that a plaintiff may file on a debt beyond the applicable statute of limitations period, it is then logical to infer that the pleading is authorized by

law under 15 U.S.C. Section 1692(f)(1). In this case, Womble raised the statute of limitations as a defense and the client, as a matter of prudence, suggested that a non-suit be taken in the case within four (4) days of the date that Womble raised the defense, and approximately 20 days prior to trial. Based on the foregoing, it cannot be argued that CDG acted in an abusive or deceptive manner as envisioned by the Fair Debt Collection Practices Act.

B. Complaint 18(b)

Womble next contends generally that CDG failed to validate the debt at the time of initial contact, or writing within five days thereafter under 15 U.S.C. Section 1692(g)(a). See Complaint, para. 18b. Womble does not allege or provide any document which would support his allegation that Womble ever requested validation of the debt, or that the initial communication from CDG to Womble failed to contain the required account information under USC 1692 (g)(a). Accordingly, as it applies to CDG, Womble's claim under 18(b) must fail as a matter of law.

C. Complaint 18(c)

Womble lastly alleges that CDG threatened to take legal action that cannot be taken. See Complaint, para. 18 c. This particular count should be dismissed because the pleading fails to particularize, or include any call, letter, or other threat by which CDG threatened to take legal action which could not have been taken. Accordingly, this allegation should also be dismissed.

Respectfully submitted,

Cawthorn, Deskevich & Gavin, P.C.

/s/

Charles A. Gavin, Esquire
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CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of March, 2013, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which send notification of such filing (NEF) to John Cole Gayle, Jr., The Consumer Law Group, 5905 West Broad Street, Suite 303, Richmond, Virginia 23230.

_____/s/_____

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Payments, Security Interest and Vehicle Treatment

- [illegible]

Insurance

- [illegible]

Details

- 12. DEFAULT.** You will be in default, and you must terminate this contract immediately, if you do any of the following:
- (a) you use spent fines or misleading information on your credit applications; (b) you do not make any payment when it is due; (c) a lien or other claim is assessed against you connected with this vehicle; (d) a lienholder or other creditor's payment or collection agent is notified of your default; (e) you fail to maintain the required insurance coverage; (f) you do not maintain the required insurance coverage; (g) you do not comply with any of the contract terms; and/or (h) you exceed any promise, representation or warranty you have made in this contract.
- You agree to be liable, as the defaulting party, for reasonable attorney's fees incurred by the attorney of your choice. Regardless of any language to the contrary, you are only liable for reasonable attorney fees if you are an attorney that is not one of our salaried employees.
- If you default, we may:

- Regard you to pay the unpaid amount financed, the earned and unpaid portion of the Finance Charge, and all other amounts due, and you to contact the lender or his agent to obtain the name and address of the person who will enter or have anyone we choose enter the premises where the vehicle, including the equipment and accessories, the goods and chattels, and the contents of the vehicle, are kept, we can dispose of them and have no liability to you, and cause any lienholder, Credit Life, Credit Disability, Guaranteed Automobile Protection Coverage, Credit Insurance, Credit Life Insurance, and Credit Insurance to be cancelled, forfeited, and voided, and permission to your outstanding balance.
- If we repossess the vehicle, and we are not prohibited by law, we will send you a notice stating that you may redeem the vehicle and that you must pay the amount needed to redeem. To redeem the vehicle, you must pay the amount needed to redeem, including reasonable attorney fees, as provided above, and court costs, to the extent permitted by applicable law. You may redeem the vehicle by paying the amount needed to redeem, including reasonable attorney fees, and other expenses due on the vehicle. The first proceeds from the money from this sale, less attorney fees and other expenses, will be applied to the amount you owe. Any excess proceeds are those subject to your normal activity. In the absence of a proceeding of foreclosure, seizure and repossession of the vehicle or other property, we will not be liable to you for any amount due to you.
- If the amount from the sale of the vehicle is not enough to cover the amount you owe, we will send you a statement of account showing the amount you still owe. When we apply the net proceeds to what you owe there is money left, we will pay it to you.

Balloon Payment/Fixed Value

- 13. BALLOON PAYMENT CONTRACT.** The information in this section 13 applies only if the contract is a balloon payment contract, as indicated on the front of this contract by a check in the box headed "Balloon Payment" on the

Balloon Payment/Fixed Value (cont'd.)

[illegible]

- 15. WARRANTIES.** If the vehicle is for personal use and, like you, the dealer is a private party, the dealer is not required to give you any warranties. If the dealer is a dealer, the dealer is required to give you the implied warranties of merchantability and fitness for a particular use. The implied warranties of the vehicle. Otherwise, you agree there are no such implied warranties.

Additional Information

- [illegible]

- 17. GENERAL.** Unless otherwise provided in this contract, any change to this contract must be in writing and signed by all parties. Notice to you is sufficient if mailed to your last address known by us. The law does not allow a part of this contract, that part will be void. The remaining parts will be enforceable. If there is more than one copy, then obligation shall be satisfied by the delivery of one copy to you by us, or delivery of one copy to you by a delivery agent. There shall be no oral modification, delivery or omission by any party. The contract shall be enforceable by the court and part of the contract for any third purpose. We may assign our rights and obligations under this contract to anyone at any time without first obtaining your consent. We may use the information you provide to us to monitor and respond to the extent permitted by law, you give us permission to monitor and record any telephone conversation between you and us.

THIS CONTRACT IS NOT SUBJECT TO ANY VERBAL AGREEMENT OR MODIFICATION, UNLESS OTHERWISE PROVIDED IN THIS CONTRACT.

- 18. DEFERRED PAYMENTS.** Any change to this contract must be in writing and signed by all the parties, however, if permitted by law, extensions and changes to the terms of this contract may be agreed to orally by you and us, and such changes shall be binding on both parties. We warrant that we will send you a written confirmation of our agreement. Interest will continue to accrue until the next payment is received. Any delinquency would not entitle us to purchase insurance coverage you have.

- [illegible]

20. GOVERNING LAW. This Sale of Missouri occurs if the

- which such process is brought.

Important Arbitration Disclosures

- 21. ARBITRATION.** The following Arbitration provisions significantly affect your rights in any dispute with us. Please read the following carefully and the arbitration provision that follows carefully before you purchase and the arbitration provision that follows carefully before you purchase and the arbitration provision that follows carefully before you purchase.